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80-1261

No.

IN THE

Supreme Court of the United States

October Term, 1980

GORDON G. GRUBB,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

a) May the District Court impose as conditions of probation the prohibitory sanctions of the Labor Management Reporting Act upon conviction of a crime which is excluded from the provisions of the Labor Management Reporting Act governing such prohibitory sanctions?

PARTIES TO THE PROCEEDING

1) Gordon G. Grubb, Petitioner

2) United States of America, Respondent

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	i
TABLE OF CITATIONS	iii
OPINION BELOW	1
STATEMENT OF JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI	4
a) The Court of Appeals Has Rendered a Decision Which Is in Direct Conflict With Statutes Governing the Conditions of Probation Imposed and With Decisions in Other Circuits on the Same Issue	4
CONCLUSION	7
APPENDIX "A"—Conditions of Probation United States District Court for the Eastern District of Pennsylvania, Dated April 3, 1980	A1
APPENDIX "B"—Judgment Order—United States Court of Appeals for the Third Circuit, Dated October 15, 1980	A4
APPENDIX "C"—Denial of Rehearing—United States Court of Appeals for the Third Circuit, Dated November 28, 1980	A7
APPENDIX "D"—29 U. S. Code § 504	A8
APPENDIX "E"—29 U. S. Code § 1111	A10

TABLE OF CITATIONS

Cases:	Page
Presser v. Brennan, 389 F. Supp. 808 (N. D. Ohio, 1975)	6
United States v. Castillo-Burgos, 504 F. 2d 217 (9th Cir. 1974)	7
United States v. Hernandez, 588 F. 2d 346 (2d Cir. 1978)	7
United States v. Pastore, 537 F. 2d 675 (2d Cir. 1976)	6
Wertz v. Hotel, Motel and Club Employees, 391 U. S. 402 (1968)	5

Other Authorities:	
Congressional Record 10991-5, Senate (daily ed. June 12, 1958)	4
Congressional Record 1328, House (daily ed. Jan. 29, 1959)	4
Congressional Record 1458-9, House (daily ed. Feb. 2, 1959)	4
Congressional Record 2668, Senate (daily ed. Feb. 19, 1959)	4
Congressional Record A6402, Appendix (daily ed. July 23, 1959)	4
Congressional Record 14989-90, Senate (daily ed. Aug. 3, 1959)	4
29 U. S. Code § 504	1, 4, 5, 7
29 U. S. Code § 1111	1, 4, 7
28 U. S. Code § 1254(1)	1

OPINION BELOW

The Judgment Order of the Court of Appeals dated November 3, 1980 is attached hereto as Appendix "B". The Order of the Court of Appeals dated November 28, 1980 Sur Petition for Rehearing is attached hereto as Appendix "C".

STATEMENT OF JURISDICTION

The Petition for Rehearing with the Suggestion for Rehearing In Banc was denied on November 28, 1980. The jurisdiction of this court is invoked under 28 U. S. C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are 29 U. S. C. § 504 attached hereto as Appendix "D" and 29 U. S. C. § 1111 attached hereto as Appendix "E".

STATEMENT OF THE CASE

On December 8, 1978, Defendant, Gordon Grubb, was charged in a four count indictment charging him with conspiracy to make an oral false statement to a Federal credit union (count one), causing and counseling Vincent Improto to make an oral false statement to a Federal credit union (count two), and on two other false statement counts of which Mr. Grubb was acquitted upon post-trial motion. This original indictment was subsequently superseded by an indictment filed on May 11, 1979 containing essentially the same charges.

The trial was held on June 21, 1979 through June 29, 1979 and a jury verdict of guilty was returned against Defendant Grubb and co-defendant Improto on June 29, 1979.

Thereafter, numerous motions for post-trial relief were filed by Defendant Grubb and Defendant Improto. The court granted Defendant Grubb's motion for acquittal on counts three and four based upon insufficient evidence. The court further ordered that Mr. Improto be retired on counts one and two (the only counts in which he was named).

Before the retrial of Mr. Improto the government dismissed Count I which charged Mr. Improto and Mr. Grubb with conspiring to make a false statement.

Mr. Improto then went to trial on Count II wherein he was charged with making a false statement and Defendant Grubb was charged with causing and counseling him to do so. Mr. Improto was acquitted on May 16, 1980.

On April 1, 1979, Mr. Grubb was sentenced to three months incarceration followed by a substantial period of probation. Numerous conditions of probation having both the effect of prohibiting or inhibiting Mr. Grubb from

earning a living and ordering Mr. Grubb to repay substantial loans were imposed. (Appendix "A").

A timely notice of appeal was filed in this case on April 9, 1980. The judgment and sentence was affirmed by a panel of this court on November 3, 1980. (Appendix "B"). A Petition for Rehearing with the Suggestion for a Rehearing In Banc was then filed and was ultimately denied on November 28, 1980. (Appendix "C").

REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI

The Court of Appeals Has Rendered a Decision Which Is in Direct Conflict With Statutes Governing the Condition of Probations Imposed and With Decisions in Other Circuits on the Same Issue.

Although the Courts have broad discretion in imposing conditions of probation, the one exception to such a broad grant of discretion exists in the area where specific statutes govern the specific conditions of probation imposed.

Congress in enacting 29 U. S. C. §§ 504 and 1111, clearly intended that officers of labor organizations and other employees of labor organizations and certain administrators, or fiduciaries or consultants with respect to employee benefit plans be prohibited from holding office or from holding certain positions where such persons have committed the specific crimes set forth in these statutes.

The history of these statutes discloses that Congress did not intend that such persons who were not convicted of the specific crimes set forth in these statutes would be ineligible to hold office. See, for example, Congressional Record 10991-5, Senate (daily ed. June 12, 1958); Congressional Record 1328, House (daily ed. Jan. 29, 1959); Congressional Record 2668, Senate (daily ed. Feb. 19, 1959); Congressional Record 1458-9, House (daily ed. Feb. 2, 1959); Congressional Record A6402, Appendix (daily ed. July 23, 1959); Congressional Record 14989-90, Senate (daily ed. Aug. 3, 1959). More particularly, an amendment was suggested which would have changed the operative language to read: "No person who has been convicted of any felony shall serve—" Congressional Record

10991-5, Senate (daily ed. June 12, 1958). The fact that such language was not included in the statute as enacted should be persuasive that Congress did not intend the result which occurred in the instant matter.

The Supreme Court has had numerous opportunities to consider the Labor Management Reporting and Disclosure Act (LMRDA) and in numerous decisions has recognized that this Act did not purport to take away from labor unions the governance of their own internal affairs and to hand that governance over to either the courts or to the Secretary of Labor, except when such intervention is necessitated by a vital public interest. See, for example, *Wertz v. Hotel, Motel and Club Employees,* 391 U. S. 402 (1968). Implicit in the Supreme Court's recognition of the necessity of balancing important interests of labor unions as against the interests of the public as exemplified in *Wertz, supra,* is the inherent recognition that where Congress has legislatively defined the line of demarcation between these interests, that the courts ought not to and may not choose a different solution.

Moreover, Congress, in addition to defining that list of crimes upon the conviction of which one is deprived of the opportunity of holding certain union offices, also defined (or at least partially defined) an administrative procedure by which one who has been or may be deprived of union position by the action of these statutes may seek review. For example, had the Labor Department suggested that Mr. Grubb was in violation of 29 U. S. C. § 504 by continuing to hold office after he was convicted of making a false statement to a Federal credit union, Mr. Grubb certainly could have initiated review by the Board of Parole of the United States Department of Justice to determine whether or not the crime of which he was convicted was within those crimes set forth in the statutory

prohibition. *Presser v. Brennan,* 389 F. Supp. 808 (N. D. Ohio, 1975).[1]

The courts of appeals which have addressed this question have consistently and unanimously prohibited the lower courts from imposing conditions of probation where there exists an alternate and well-defined procedure governing the imposition of such penalties and especially where such a procedure would afford a defendant procedural rights which would otherwise be denied to him.

For example, *United States v. Pastore,* 537 F. 2d 675 (2d Cir. 1976), concerned an attorney who had been convicted of filing false income tax returns. The Court conditioned probation upon the Defendant's resignation from the Bar. Such a condition was held to be an abuse of the Court's discretion because the state of the Defendant's admission had "exclusive jurisdiction over admission to and removal from the Bar" and because the Defendant was deprived of due process in that he was not permitted to practice law without notice or an appropriate hearing. The Court finally concluded after a lengthy discussion which is particularly applicable to the facts in the instant case that:

> "In any event before any Defendant is required to give up his job or trade or profession he should be given a meaningful opportunity to demonstrate why such a condition might be inappropriate. If there is already in existence a well-defined procedure for resolution of that issue it makes sense to utilize it." 537 F. 2d 675.

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1. Although *Presser* makes it necessary to leave office during review by the Board of Parole, it is questionable whether such a step is necessary where the issue is the applicability of the statute as opposed to an exemption from the penalty imposed.

United States v. Hernandez, 588 F. 2d 346 (2d Cir. 1978) and *United States v. Castillo-Burgos*, 504 F. 2d 217 (9th Cir. 1974) both involved convicted narcotics traffickers who were ordered to leave the United States upon release from prison. Both of these conditions of probation were found to be improper, invalid and an abuse of discretion because there existed a specific statutory scheme by which such a result could be accomplished after the usual due process hearing.

The effect of the District Court's imposition of the conditions of probation (which were literally copied from § 504 and § 1111) is to amend these sections to include crimes which Congress specifically decided not to include and to deprive Mr. Grubb of the opportunity of demonstrating to an administrative tribunal that the imposition of such conditions is inappropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES C. SCHWARTZMAN
MICHAEL B. L. HEPPS
Attorneys for Petitioner

APPENDIX "A"

UNITED STATES DISTRICT COURT
FOR EASTERN DISTRICT OF PENNSYLVANIA

DOCKET NO. 78-374-1

UNITED STATES OF AMERICA

v.

GORDON G. GRUBB,

Defendant

JUDGMENT AND PROBATION/ COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date, March 31, 1980, with counsel, James Schwartzman, Esq.

There being a verdict of guilty, defendant has been convicted as charged of the offenses of 18 U. S. C. § 371 (Conspiracy), 18 U. S. C. § 1014 (Making of False Statement to Influence Loan Application).

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant be hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of (5) FIVE YEARS, and on condition that the defendant be confined in a jail type or treatment institution for a period of 3 months. The execution of the remainder of the sentence of imprisonment is hereby

suspended. The defendant is placed on probation for a period of four and three-quarter years to commence upon the defendant's release from confinement upon the following terms and conditions.

1. Defendant shall be required to resign his positions as Secretary-Treasurer of Teamsters Local 830 and President of Teamsters Joint Council 53 during the probationary period.

2. Defendant shall be prohibited from acting as an officer, director, trustee, member of the governing body, manager, organizer, consultant, advisor, employee, agent or representative in any capacity for any labor organization or employee benefit plan, except that defendant may during the period of probation act as a business agent.

3. Defendant shall be prohibited from dealing with labor organizations or employee benefit plans on behalf of any employer association or employer organization.

4. Defendant shall be prohibited from consulting or giving advice concerning using, selling, transfering, diverting, receiving, disposing, pledging, disbursing, or influencing in any manner directly or indirectly the monies, funds, assets or properties of any labor organization or employee benefit plan.

5. Defendant shall under the supervision of the Probation Office continue to make payments to liquidate the 14 five thousand dollar loans taken out by the individual members of the Local Union 830.

The foregoing sentence is imposed on count one of the indictment. On count two of the indictment sentence is suspended and the defendant is placed on probation for a period of two years with the probationary period to run concurrently with the probationary period imposed on count one and with the same conditions imposed during the probationary period on ccunt one.

The period of incarceration on count one shall be served at Eglin Air Force Base. Execution of sentence is suspended pending Appeal.
Signed by U. S. District Judge.

/s/ EDWARD N. CAHN, *J.*

Date: April 12, 1980

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-1533

UNITED STATES OF AMERICA

v.

GRUBB, GORDON G.,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
D. C. Criminal No. 78-00374-01

Argued October 15, 1980
Before: HUNTER, WEIS, *Circuit Judges*, and
FISHER, *District Judge*

Judgment Order

After considering the contentions raised by appellant, to wit, that:

1) The evidence presented at Mr. Grubb's trial was not sufficient to support his conviction on counts one and two of the superseding indictment; and

* Honorable Clarkson S. Fisher, Chief Judge, United States District Court for the District of New Jersey, sitting by designation.

2) The trial judge erred in allowing the Government to call a witness on a crucial element of the crime charged, when the Government knew that the witness would offer exculpatory testimony, for the primary purpose of introducing his grand jury testimony; and

3) The trial judge erred in admitting into evidence Mr. Kaminski's grand jury testimony before deciding whether it was inconsistent with the trial testimony; and

4) The trial court may not impose as a condition of probation an order requiring defendant to give up numerous positions within the union if there are statutory provisions directing an administrative agency to review similar crimes before imposing sanctions; and

5) The trial court abused its discretion by imposing on defendant a condition of probation which deprived him of opportunities to earn income while requiring him to repay substantial money; and

6) 18 U. S. C. § 1014 does not prohibit the making of an oral false statement; and

7) The Government did not prove that the credit union was a federal credit union; and

8) The Government may not choose to retry a co-defendant only for a substantive crime and not for conspiracy to commit that crime when their *sole* reason for so preceeding is to insure that the possible acquittal of the co-defendant of conspiracy does not act as an acquittal of the defendant.

It is ADJUDGED AND ORDERED that the judgement of the district court be and is hereby affirmed.

By THE COURT,

/s/ JAMES HUNTER
James Hunter, III, *Circuit Judge*

Attest: /s/ SALLY MRVOS
Sally Mrvos, *Clerk*

DATED: Nov. 3, 1980

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-1533

UNITED STATES OF AMERICA,
Appellee,

v.

GORDON G. GRUBB,
Appellant.

Sur Petition For Rehearing

Present: SEITZ, *Chief Judge,* ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges*

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

/s/ JAMES HUNTER, III
James Hunter, III *Judge*

Dated: November 28, 1980

APPENDIX "D"

29 USCS

§ 504. Prohibition against certain persons holding office

(a) No person who is or has been a member of the Communist Party or who has been convicted of, or served any part of a prison term resulting from his conviction of, robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, or a violation of title II or III of this Act [29 USCS §§ 431-441, 461f466], or conspiracy to commit any such crimes, shall serve—

(1) as an officer, director, trustee, member of an executive board or similar governing body, business agent, manager, organizer, or other employee (other than as an employee performing exclusively clerical or custodial duties) of any labor organization, or

(2) as a labor relations consultant to a person engaged in an industry or activity affecting commerce, or as an officer, director, agent, or employee (other than as an employee performing exclusively clerical or custodial duties) of any group or association of employees dealing with any labor organization, during or for five years after the termination of his membership in the Communist Party, or for five years after such conviction or after the end of such imprisonment, unless prior to the end of such five-year period, in the case of a person so convicted or imprisoned, (A) his citizenship rights, having been revoked as a result of such conviction, have been fully restored, or (B) the Board of Parole of the United

States Department of Justice determines that such person's service in any capacity referred to in clause (1) or (2) would not be contrary to the purposes of this Act. Prior to making any such determination the Board shall hold an administrative hearing and shall give notice of such proceeding by certified mail to the State, county, and Federal prosecuting officials in the jurisdiction or jurisdictions in which such person was convicted. The Board's determination in any such proceeding shall be final. No labor organization or officer thereof shall knowingly permit any person to assume or hold any office or paid position in violation of this subsection.

(b) Any person who willfully violates this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

(c) For the purposes of this section, any person shall be deemed to have been "convicted" and under the disability of "conviction" from the date of the judgment of the trial court or the date of the final sustaining of such judgment on appeal, whichever is the later event, regardless of whether such conviction occurred before or after the date of enactment of this Act [Sept. 14, 1959]. (Sept. 14, 1959, P. L. 86-257, Title V, § 504, 73 Stat. 536.)

APPENDIX "E"

29 USCS

§ 1111. Prohibition against certain persons holding certain positions

(a) No person who has been convicted of, or has been imprisoned as a result of his conviction of, robbery, bribery, extortion, embezzlement, fraud, grand larceny, burglary, arson, a felony violation of Federal or State law involving substances defined in section 102(6) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 [21 USCS § 802(6)], murder, rape, kidnaping, perjury, assault with intent to kill, any crime described in section 9(a)(1) of the Investment Company Act of 1940 (15 USCS § 80a-9(a)(1)), a violation of any provision of this Act [see references in text note to 29 USCS § 1001 for classifications of "this Act"], a violation of section 302 of the Labor-Management Relations Act, 1947 (29 USCS § 186), a violation of chapter 63 of title 18, United States Code [18 USCS §§ 1341-1343], a violation of section 874, 1027, 1503, 1505, 1506, 1510, 1951, or 1954 of title 18, United States Code [18 USCS §§ 874, 1027, 1503, 1505, 1506, 1510, 1951, or 1954], a violation of the Labor-Management Reporting and Disclosure Act of 1959 (29 USCS § 401), or conspiracy to commit any such crimes, or a crime in which any of the foregoing crimes is an element, shall serve or be permitted to serve—

(1) as an administrator, fiduciary, officer, trustee, custodian, counsel, agent, or employee of any employee benefit plan, or

(2) as a consultant to any employee benefit plan,

during or for five years after such conviction or after the end of such imprisonment, whichever is the later, unless prior to the end of such five-year period, in the case of a person so convicted or imprisoned, (A) his citizenship rights, having been revoked as a result of such conviction, have been fully restored, or (B) the Board of Parole of the United States Department of Justice determines that such person's service in any capacity referred to in paragraph (1) or (2) would not be contrary to the purposes of this title [5 USCS § 5108; 18 USCS §§ 664, prec. 101, 1027, 1954; 29 USCS §§ 301-309, 441, 1001-1003, 1021-1031, 1051-1061, 1081-1086, 1101-1114, 1131-1144]. Prior to making any such determination the Board shall hold an administrative hearing and shall give notice of such proceeding by certified mail to the State, county, and Federal prosecuting officials in the jurisdiction or jurisdictions in which such person was convicted. The Board's determination in any such proceeding shall be final. No person shall knowingly permit any other person to serve in any capacity referred to in paragraph (1) or (2) in violation of this subsection. Notwithstanding the preceding provisions of this subsection, no corporation or partnership will be precluded from acting as an administrator, fiduciary, officer, trustee, custodian, counsel, agent, or employee, of any employee benefit plan or as a consultant to any employee benefit plan without a notice, hearing, and determination by such Board of Parole that such service would be inconsistent with the intention of this section.

(d) Any person who intentionally violates this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

(c) For the purposes of this section:

(1) A person shall be deemed to have been "convicted" and under the disability of "conviction"

from the date of the judgment of the trial court or the date of the final sustaining of such judgment on appeal, whichever is the later event.

(2) The term "consultant" means any person who, for compensation, advises or represents an employee benefit plan or who provides other assistance to such plan, concerning the establishment or operation of such plan.

(3) A period of parole shall not be considered as part of a period of imprisonment.

(Sept. 2, 1974, P. L. 93-406, Title I, Subtitle B, Part 4, § 411, 88 Stat. 887.)